Maybank International (L) Ltd v Export-Import Bank of Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-128–01 OF 2012
ZALEHA YUSOF J
30 AUGUST 2012

Contract — Guarantee — Liability of guarantor — Whether plaintiff breached its duties under guarantee — Whether plaintiff failed to meet its obligations under guarantee agreement — Whether plaintiff at fault for non-registration of borrower's machinery/equipment — Whether plaintiff failed to take all reasonable steps to preserve machinery/equipment — Estoppel — Whether defendant estopped from complaining about removal of machinery to Johor — Whether defendant had been deprived of its remedies — Whether defendant was discharged from its liability to pay plaintiff guaranteed amount — Contracts Act 1950 s 92

Evidence — Expert evidence — Court to assess weight of evidence — Whether court was satisfied as to expertise of experts in relevant field — Whether expert evidence was of assistance to court

Evidence — Witness — Failure to call witness — Decision to move borrower's machinery/equipment to Malaysia was disputed — Defendant failed to call any of its senior officers who knew of decision to give evidence — Whether adverse inference ought to be drawn against defendant — Evidence Act 150 s 114(g)

Maybank International Ltd (the plaintiff) granted Bitumen Bales (Laem Chabang) Co Ltd ('the borrower') a term loan so as to enable it to set up a bitumen packing plant in Thailand for a company in Thailand called Transtech Pte Ltd ('Transtech'). In order to mitigate the risk associated with the term loan, the Export-Import Bank of Malaysia Bhd ('the defendant') agreed to furnish an unconditional guarantee in the sum of USD5,992,500 ('the guaranteed amount') with interest in the event of default by the borrower. Besides the guarantee agreement executed by the defendant in favour of the plaintiff, the term loan was also secured by various other securities furnished by the borrower. The guarantee also provided that the plaintiff should take such reasonable steps at the defendant's directions to effect recoveries of the security in the event of a default by the borrower. The plaintiff duly granted the term loan of USD5,915,878.05. Subsequently, as a result of the civil commotion and political upheaval in Thailand, Transtech terminated its agreement to purchase the bitumen bales from the borrower. Upon losing its sole customer

for whom the plant was to be built, the borrower could not commission the plant and defaulted in its payments under the term loan. Consequently, the plaintiff had commenced legal proceedings to recover the outstanding term loan and had since obtained judgment against the borrower and its guarantors. The plaintiff also issued a notice of claim to the defendant for the payment of the guaranteed amount. The defendant denied liability under the guarantee agreement and argued that the plaintiff had breached its duties under the guarantee agreement and that as such the defendant's liability to pay the guaranteed amount had been discharged. The defendant submitted that the guarantee expressly stipulated that the plaintiff was under an obligation to create a mortgage of the borrower's machinery/equipment as one of the securities to the term loan, but the plaintiff had failed to do so. The defendant also submitted that the plaintiff had failed to take all reasonable steps to preserve the machinery/equipment, which were intended to secure the term loan facility, and that such failure had resulted in the machinery/equipment being dissipated and/or removed from the Thai factory. The plaintiff and the defendant relied on expert witnesses, who were Thai lawyers, to give evidence in respect of the registration of a charge over machinery/equipment according to the laws of Thailand.

Held, allowing the plaintiff's claim with costs:

(1) The plaintiff's expert, who had been in practice for more than 28 years, had more experience and knowledge in the relevant area of law than the defendant's expert, who had been practising law for ten years. The defendant's expert made reference to the provisions of the Thai Civil and Commercial Code (the CCC) but the plaintiff's expert clarified that the CCC is general law and that the specific law to look at in relation to registered machinery was the Machinery Registration Act ('MRA'), which provided that in order to obtain a mortgage over machinery/equipment the ownership of the machinery/equipment had to be registered first pursuant to the MRA. Based on the evidence of both experts it was clear that for the purpose of mortgaging the machinery/equipment, the applicant had to obtain conclusive ownership of the machinery before a charge/mortgage could be registered over the machinery. In the present case, it was a fact that if the ownership of the borrower's machinery was not registered under the MRA, the borrower had no legal ownership over the same, which would entitle the borrower to create a charge/mortgage and register the same over the borrower's machinery. As such, the plaintiff could not be faulted on the non-registration of the charge (see paras 32, 38, 40, 49 & 51).

(2) The defendant was estopped from complaining that the plaintiff had failed to take all reasonable steps to preserve the machinery/equipment and that such failure had resulted in the machinery being dissipated or removed from the Thai factory. The evidence produced during the trial

showed that the defendant had full knowledge of the borrower's intention to move the machinery to Johor and it made no objections to the same. Further, the defendant had not produced any of the senior officers from its credit department, who knew of the decision to move the borrower's machinery/equipment to Malaysia, as witnesses at the trial. Such failure on the part of the defendant would lead to the adverse inference under s 114(g) of the Evidence Act 1950 that their evidence was unfavourable to the defendant (see paras 54–56).

(3) The onus was on the defendant to prove both limbs under s 92 of the Contracts Act before it was discharged from its liability to pay to the plaintiff the guaranteed amount. In the present case, the defendant's eventual remedy which was the security over the borrower's machinery/equipment was intact, as the plaintiff had not sold the same. Hence there was nothing for the defendant to complain about. The defendant had no grounds to deny liability under the guarantee agreement, as there had been no deprivation of the defendant's remedies (see paras 57, 60 & 75).

(4) There was no clause in the guarantee agreement that discharged the defendant from its liability to pay the guaranteed amount if the plaintiff failed to meet its obligations. The proviso in the form of clause 6.1.10 of the guarantee agreement only provided that the plaintiff should take such reasonable steps at the defendant's directions to effect recoveries of the security when an event of default occurred. However, the defendant had refused to give any directions to the plaintiff despite the plaintiff's request for the same. In any case, this proviso did not discharge the defendant from its liability under the guarantee agreement. Further, it was an undeniable fact that the parties had intended for the defendant to unconditionally and irrevocably guarantee the term loan (see paras 68–69 & 75).

[Bahasa Malaysia summary

Maybank International Ltd ('plaintif') telah memberikan Bitumen Bales Co (Laem Chabang) Co Ltd ('peminjam') suatu pinjaman berjangka untuk membolehkan ia membina kilang pembungkusan bitumen di Thailand bagi sebuah syarikat di Thailand yang dipanggil Transtech Pte Ltd ('Transtech'). Untuk mengurangkan risiko yang dikaitkan dengan terma berjangka, Export-Import Bank of Malaysia Bhd ('defendan') bersetuju untuk memberikan jaminan tidak bersyarat berjumlah USD5,992,500 ('jumlah yang dijamin') dengan faedah jika berlaku keingkaran oleh peminjam. Selain perjanjian jaminan yang dimeterai oleh defendan bagi plaintif, pinjaman berjangka tersebut juga dijamin oleh pelbagai jaminan lain yang diberikan oleh peminjam. Jaminan juga memperuntukkan bahawa plaintif seharusnya mengambil langkah-langkah munasabah berdasarkan arahan defendan untuk membolehkan pemerolehan semula jaminan jika berlaku keingkaran oleh

peminjam. Plaintif memberikan pinjaman berjangka sebanyak USD5,915,878.05. Seterusnya, akibat kekecohan awam dan pergolakan politik di Thailand, Transtech menamatkan perjanjian untuk membeli bitumen bales daripada peminjam. Apabila kehilangan satu-satunya pelanggan yang mana kilang tersebut dibina, peminjam tidak boleh memberikan komisen kepada kilang tersebut dan ingkar dalam pembayaran di bawah pinjaman berjangka. Akibatnya, plaintif memulakan prosiding undang-undang untuk mendapatkan semula pinjaman berjangka terkumpul dan telah pun mendapat penghakiman terhadap peminjam dan penjamin-penjaminnya. Plaintif juga mengeluarkan notis tuntutan terhadap defendan bagi pembayaran jumlah yang dijamin. Defendan menafikan liabiliti di bawah perjanjian jaminan dan menghujahkan bahawa plaintif telah melanggar kewajipannya di bawah perjanjian jaminan dan bahawa dengan itu, liabiliti defendan untuk membayar jumlah yang dijamin telah dilepaskan. Defendan menghujahkan bahawa jaminan dengan jelas menyatakan bahawa plaintif berkewajipan membuat pajak gadai bagi jentera/alatan peminjam sebagai salah satu jaminan kepada pinjaman berjangka, tetapi plaintif gagal berbuat demikian. Defendan juga menghujahkan bahawa plaintif gagal mengambil langkah-langkah munasabah untuk menjaga jentera/alatan, yang sepatutnya bertujuan untuk menjamin kemudahan pinjaman berjangka, dan kegagalan tersebut telah mengakibatkan kehilangan jentera/alatan tersebut dan/atau dialih keluar daripada kilang Thailand. Plaintif dan defendan bersandarkan pada keterangan pakar, yang merupakan peguam-peguam Thailand, untuk memberi keterangan bagi pendaftaran pajakan ke atas jentera/alatan di bawah undang-undang Thailand.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Saksi pakar plaintif, yang telah beramal lebih daripada 28 tahun, mempunyai lebih pengalaman dan pengetahuan dalam bidang undang-undang berbanding saksi pakar defendan, yang telah beramal selama sepuluh tahun. Saksi pakar defendan merujuk kepada peruntukan Thai Civil and Commercial Code ('CCC') tetapi saksi pakar plaintif gagal menjelaskan bahawa CCC adalah undang-undang am dan bahawa undang-undang khusus untuk dilihat bagi jentera berdaftar adalah Machinery Registration Act ('MRA'), yang memperuntukkan bahawa untuk mendapatkan pajakan ke atas jentera/alatan, pemilikan ke atas jentera/alatan mestilah didaftarkan dahulu di bawah MRA. Berdasarkan keterangan kedua-dua saksi pakar, adalah jelas bahawa tujuan pajakan ke atas jentera/alatan, pemohon mestilah mendapat pemilikan muktamad ke atas jentera sebelum pajakan/gadaian boleh didaftarkan ke atas jentera tersebut. Dalam kes ini, adalah fakta bahawa jika pemilikan ke atas jentera peminjam tidak didaftarkan di bawah MRA, peminjam tidak mempunyai pemilikan sah ke atasnya, yang mana akan memberikan hak kepada peminjam untuk membuat gadaian/pajakan dan mendaftarnya

ke atas jentera peminjam. Dengan itu, plaintif tidak boleh dipersalahkan kerana tidak mendaftarkan gadaian tersebut (lihat perenggan 32, 38, 40 & 51).

(2) Defendan diestop daripada mengadu bahawa plaintif telah gagal mengambil langkah-langkah munasabah untuk menjaga jentera/alatan dan bahawa kegagalan tersebut mengakibatkan jentera tersebut hilang atau dialih keluar dari kilang Thailand. Keterangan yang dikemukakan ketika perbicaraan menunjukkan bahawa defendan mempunyai pengetahuan penuh akan niat peminjam untuk mengalihkan jentera ke Johor dan tidak membantahnya. Selanjutnya, defendan tidak mengemukakan seorang pun pegawai kanan daripada jabatan kredit, yang mengetahui tentang keputusan untuk mengalihkan jentera/alatan peminjam ke Malaysia, sebagai saksi-saksi ketika perbicaraan. Kegagalan di pihak defendan tersebut membawa kepada anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 bahawa keterangan mereka tidak berpihak kepada defendan (lihat perenggan 54–56).

(3) Tanggungjawab adalah pada defendan untuk membuktikan cabang-cabang di bawah s 92 Akta Kontrak sebelum ia dilepaskan daripada liabiliti untuk membayar jumlah yang dijamin kepada plaintif. Dalam kes ini, remedi akhir iaitu jaminan ke atas jentera/alatan peminjam kekal, kerana plaintif belum menjualnya. Dengan itu, tiada apa-apa untuk diadukan oleh defendan. Defendan tidak mempunyai alasan untuk menafikan liabiliti di bawah perjanjian jaminan, kerana tiada penafian ke atas remedi-remedi defendan (lihat perenggan 57, 60 & 75).

(4) Tiada klausa dalam perjanjian jaminan yang melepaskan defendan daripada liabilitinya untuk membayar jumlah yang dijamin jika plaintif gagal memenuhi kewajipannya. Proviso dalam bentuk klausa 6.1.10 perjanjian jaminan hanya memperuntukkan bahawa plaintif sewajarnya mengambil langkah-langkah munasabah di bawah arahan defendan untuk membolehkan pemerolehan semula jaminan sekiranya berlaku keingkaran. Walau bagaimanapun, defendan enggan memberi sebarang arahan kepada plaintif walaupun plaintif memintanya. Dalam apa jua keadaan, proviso ini tidak melepaskan defendan daripada liabiliti di bawah perjanjian jaminan. Selanjutnya, adalah fakta yang tidak boleh dipertikaikan bahawa pihak-pihak bermiat agar defendan menjamin pinjaman berjangka tersebut tanpa syarat dan tanpa boleh membatalkannya (lihat perenggan 68–69 & 75).]

Notes

For cases on court to assess weight of evidence, see 7(1) *Mallal's Digest* (4th Ed, Reissue) paras 1776–1778.

A For cases on failure to call witness, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3259–3277.

For cases on liability of guarantor, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5059–5071.

B **Cases referred to**

Cempaka Finance v PKB-Teknik Sdn Bhd & Ors [2010] MLJU 1326; [2011] 10 CLJ 71, HC (refd)

Eon Bank Bhd (previously know as Oriental Bank Bhd) v Mohd Yunus bin Alias & Ors [2010] 9 MLJ 587, HC (refd)

C

Ooi Boon Leong & Ors v Citibank NA [1984] 1 MLJ 222, PC (refd)

Yoong Sze Fatt v Pengkalen Securities Sdn Bhd [2010] 1 MLJ 85, CA (refd)

Legislation referred to

D Civil and Commercial Code [TH] ss 458, 459, 460
Contracts Act 1950 ss 92, 94
Evidence Act 1950 s 114(g)
Machinery Registration Act [TH] ss 4, 5, 6
Ministerial Regulations No 8 [TH] cl 2, Lists 1, 2

E

Yoong Sin Min (Chung Ai Lei with her) (Shook Lin & Bok) for the plaintiff.
Karlos Israphil Bendlim (Siti Aisyah Mustapha with him) (Wan Amin & Karlos) for the defendant.

F **Zaleha Yusof J:**

THE PLAINTIFF'S CLAIM

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[1] The plaintiff is claiming for a sum of USD5,975,377.02 which represent 95% of the total outstanding amount due and owing by one Bitumen Bales (Laem Chabang) Co Ltd ('the borrower') to the plaintiff, in respect of a term loan facility which the plaintiff had granted to the borrower and guaranteed by the defendant.

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THE DEFENDANT'S DEFENCE

I **[2]** Although the defendant does not dispute the guarantee, the defendant relies on s 92 of the Contracts Act 1950 and contends that its liability to pay the sum claimed is discharged as the plaintiff has breached the terms of the guarantee when it failed, among others, to:

(a) obtain certain security to the facility; and

(b) safeguard the borrower's machinery intended as security to the facilities, from being dissipated.

THE WITNESSES

[3] Eight witnesses were produced by the respective parties to give evidence at the trial, five for the plaintiff and three for the defendant, as follows:

The plaintiff's witnesses

	Name	Designation
PW1	Mohd Nurnizam bin Md Norzamani	Account Manager (Corporate Banking), Malayan Banking Bhd
PW2	Hazairi bin Hassan	Executive (Credit Administration), Maybank
PW3	Khushwant Singh Dhanoa	Advocate & Solicitor, High Court Malaya
PW4	Zarina Omar	Assistant Vice President (Remedial/Asset Reconstruction 1), Malayan Banking Bhd
PW5	Apichart Phankeasorn	Senior Consultant, Messrs Herbert Smith (Thailand) Ltd

The defendant's witnesses

	Name	Designation
DW1	Suriya Nachin	Barrister at Law (Thailand), Messrs SICOlaw (Thailand) Ltd
DW2	Rahimah bt Abdullah	Assistant Manager (Special Asset Management

		Department, EXIM Bank
DW3	Lim Weng Leong	Assistant Manager (Business Technical Analysis Department), EXIM Bank

THE UNDISPUTED FACTS

[4] The borrower had started out as a customer of the defendant as the defendant itself had granted two insurance policies to the borrower, insuring the borrower's investment against political risks in Thailand.

[5] Sometime in 2007, the defendant had approached the plaintiff to grant a US Dollar loan to the borrower to part finance the purchase of machinery and equipment, and installation costs for the setting up of the borrower's bitumen packing plant in Thailand. The plant was to be set up to specifically pack bitumen in its liquid form, into bales (polymer film bags) for a company in Thailand called Transtech Pte Ltd ('Transtech'), in accordance with Transtech's specifications. The borrower was specially incorporated by its main shareholder and director, Gordon Thomas, to set up this new factory.

[6] To mitigate the risk associated with the loan to be granted by the plaintiff to the borrower, the defendant agreed to furnish an unconditional guarantee to the plaintiff for up to 95% of the plaintiff's loan and interest thereon, subject to a maximum amount of USD5,992,500 ('the guaranteed amount').

[7] In reliance on the defendant's guarantee to pay the guaranteed amount in the event of default by the borrower, the plaintiff granted to the borrower a term loan of USD5,992,500 ('the term loan'), as in the letter of offer, dated 23 January 2008 and the facility agreement dated 19 March 2008.

[8] On 19 March 8008, the defendant executed the guarantee agreement in favour of the plaintiff as security for the term loan ('the defendant's guarantee'), wherein it was agreed, inter alia, that:

(a) The defendant unconditionally and irrevocably guaranteed to the plaintiff that the defendant shall pay to the plaintiff 95% of the outstanding term loan amounts due, subject to the maximum limit of the guaranteed amount. This is defined as USD5,992.500.00 (cl 3.1 of the guarantee agreement);

(b) The defendant shall pay to the plaintiff guaranteed amount within 60 days from the date of receiving the plaintiff's notice of claim (cl 3.2(c)(i) of the guarantee agreement; and

(c) Upon the defendant having paid or discharged the guaranteed amount to the plaintiff, the defendant would have the right to be subrogated to all rights possessed by and all securities held by the plaintiff, in respect of the borrower's debt or liability (cl 5.1 of the guarantee agreement).

[9] Besides the guarantee agreement, the term loan was to be secured by various security including the following:

(a) a debenture dated 19 March 2008 entered between the plaintiff and the borrower. The power of attorney to sell the assets charged hereunder is seen at cl 21.1, at p 210, bundle 'B'. This has been registered with the High Court;

(b) an assignment of a political risk insurance policy issued by the defendant dated 19 March 2008;

(c) an assignment of contract proceeds and sales proceeds under a purchase and sales agreement between the borrower and Transtech dated 19 March 2008 (the offtake agreement);

(d) a deed of assignment and charge over a debt service reserve account ('DSRA') and a collection/project account (collectively 'the designated accounts') dated 19 March 2008;

(e) a power of attorney granted by the borrower to the plaintiff dated 19 March 2008. The power of attorney has been duly registered with the High Court;

(f) a letter of guarantee by the borrower's director, Gordon William Thomas ('Gordon Thomas') in favour of the plaintiff dated 19 March 2008;

(g) a corporate guarantee by Bitumen Bales Sdn Bhd in favour of the plaintiff; and

(h) there was also to have been granted by the borrower:

(i) a first legal charge on the machineries and equipment to be lodged with the relevant Thai authorities upon the borrower acquiring legal and beneficial ownership of the said machineries and equipment; and

(ii) an assignment of rights under standby letters of credit ('SBLC') issued by a bank in Thailand on behalf of Transtech with value not less than one month estimated sales value, to be furnished to the plaintiff prior to commissioning of the borrower's plant.

[10] The plaintiff had duly granted the term loan up to the principal sum of USD5,915,878.05.

[11] On or around 26 August 2008, it was reported in local and international newspapers that Thailand was undergoing political unrest and violence which had resulted in, amongst others, the closure of roads and airports in Thailand, and a declaration of a state of emergency. This is well documented and the press reports are seen at pp 8–72 of bundle 'C2'.

[12] As a result of the civil commotion and political upheaval, on 27 March 2009, Transtech terminated its agreement to purchase the bitumen bales from the borrower.

[13] As a result of losing its sole customer for whom the plant was to be built, the borrower could not commission the plant and defaulted in payments under the term loan.

[14] According to PW1's witness statement and the minutes of a meeting held on 25 May 2009, (as prepared by the defendant's officers at pp 314–316 of bundle 'B') representatives of the plaintiff and the defendant at the meeting on 25 May 2009 were informed by Gordon Thomas that the borrower did not commission the plant because Transtech had terminated the offtake agreement due to the political situation in Thailand. It was also discussed at this meeting that:

(a) the borrower could not find a replacement buyer and the value of the plant would depreciated if the same was commissioned;

(b) the borrower had submitted its claim under bits insurance policy to the defendant; and

(c) there was a discussion for restructuring of the term loan. It was suggested that the borrower shifts the machinery and equipment at the Thai plant to its sister company's other plant in Port Tanjung Pelepas in Johor, to produce bitumen bales for existing and new clients.

[15] Thereafter, further meetings were held between Gordon Thomas, representatives of the plaintiff and the defendant to negotiate a restructuring of the term loan. The plaintiff was willing to grant an additional loan to the borrower to enable the borrower to modify its plant to a potential new purchaser's requirements. However, the defendant was not willing to provide an additional guarantee for the additional loan amount. As a result thereof, the restructuring exercise did not materialise.

[16] As a result of the above, the borrower did not register its machinery at

the plant for fear of depreciation of the same, due to the possibility of the legal authorities having to see the machinery commissioned or tested. The legal charge over the machinery was thus not given.

[17] On 26 April 2011, arising from the borrower's continued failure to make payments under the term loan, the plaintiff demanded from the borrower the sum of USD6,289,870.55 due and owing under the term loan. The borrower has failed, neglected and/or refused to settle the sum as demanded or any part thereof. The plaintiff has since obtained judgment against the borrower (on 7 March 2012) and its guarantors (on 7 March 2012 and 25 April 2012).

[18] On 8 June 2011, the plaintiff issued a notice of claim to the defendant to demand for the payment of the guaranteed amount of USD5,975,377.02, representing 95% of the outstanding sum due from the borrower to the plaintiff of USD6,289,870.55 as at 26 April 2011.

[19] In the same letter, the plaintiff sought directions from the defendant concerning the preservation of the securities for the term loan, as required under cl 6.1.10 of the guarantee agreement. In spite of the said demand, the defendant has refused to settle the sums as demanded or any part thereof. Instead, the defendant informed the plaintiff that it was unable to admit liability under the plaintiff's claim, and that they 'were not in a position to advise' the plaintiff on the preservation of the said securities vide letters of 13 June 2011 at p 41, bundle 'C1' which referred to its earlier letter of 3 May 2010 at p 20, bundle 'C1'. On 30 January 2012, this suit was filed.

THE ISSUE

(1) *Whether the plaintiff has breached its duties under the guarantee.*

(2) *Whether the defendant's liability is discharged.*

THE FINDINGS OF THE COURT

[20] Section 92 of the Contracts Act 1950 states as follows:

> 92 Discharge of surety by creditor's act or omission impairing surety's eventual remedy.
>
> If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

[21] The defendant submits that the law imposes a duty on the creditor to safeguard the interest of the surety as the surety will ultimately, upon discharging his obligation to the creditor under the guarantee, assume all the creditor's rights against the debtor.

[22] The defendant argues that there are two limbs under s 92 that must be satisfied to attract the application of that provision to this case namely, the defendant must show that:

(a) the plaintiff has acted inconsistent with the defendant's rights as surety, or omitted to do any act which it is duty bound to the defendant to do; and

(b) the plaintiff's action or inaction had impaired the defendant's eventual remedy against the borrower.

[23] The defendant argues that both limbs under s 92 have been satisfied when the plaintiff failed in its duties under the guarantee by not registering the mortgage and when it failed to safeguard the machines.

[24] Clause 6.1.3(i) of the guarantee stipulates the plaintiff's obligation to create a mortgage on the borrower's machinery/equipment as one of the securities to the facility. It provides:

> **6 Obligations of Maybank**
>
> 6.1. MAYBANK hereby irrevocably undertakes with EXIM BANK that **MAYBANK shall**:
>
> 6.1.1 …,
>
> 6.1.2 …,
>
> 6.1.3 *secure the Facility* by, among others, the following:
>
> i) Debenture on the entire borrower's fixed and floating assets. In addition, **1st legal charge on the machineries and equipment** to be financed for United States Dollars on Nine Hundred Ninety Two Thousand and Five Hundred (USD5,992,500.00) only is to be lodged with the relevant Thai authorities upon the borrower acquiring legal and beneficial ownership of the said machineries and equipment. (Emphasis added.)

[25] It is common ground between the parties that the term '1st legal charge' used in cl 6.1.3(i) above is for all intents and purposes refer to a 'mortgage' by reason that a charge is not a form of security recognised by the laws of Thailand.

[26] DW1, the defendant's expert witness on Thai laws, testified that in Thailand security over moveable assets to secure the performance of an

obligation (including loan repayment obligation) can only be created by way of mortgage or pledge. The latter is not relevant here.

[27] It is also common ground that under the laws of Thailand a mortgage over moveable assets in that country, which includes the borrower's machinery/equipment, can only be created and becomes effective upon registration. The defendant says that pursuant to the provisions in the Thai Civil and Commercial Code ('CCC'), the borrower becomes the owner of the machinery and equipment upon entering the agreement with Eastern Petroleum Sdn Bhd ('Fabricator'). The defendant contends that a charge over the borrower's machinery and equipment ought to have been lodged with the Thai authorities at this juncture.

[28] The defendant contends that it is a fact admitted by the plaintiff that a mortgage over the machinery/equipment was not created and not registered with the Thai authorities.

[29] Hence the defendant further contends that the non-registration of the mortgage constitutes a breach of the plaintiff's obligation under cl 6.1.3(i) of the guarantee.

[30] Now, talking about expert witness, the plaintiff and the defendant had each produced expert witnesses, who are Thai lawyers, namely PW5 and DW1 respectively, to give evidence in respect of the registration of a charge over machinery and equipment according to the laws of Thailand.

[31] The defendant's expert witness, DW1, stated that he has been practicing law for ten years, and had admitted during cross-examination that he had only done one transaction involving the registration of machinery. On the other hand, the plaintiff's expert witness, PW5, has stated he has been in practice for almost 28 years, and that he has conducted more than 50 transactions involving the transfer of ownership of machinery and machinery mortgage registration.

[32] The plaintiff's expert, PW5, to me clearly has more experience and knowledge in the relevant area of law than the defendant's expert. In considering whether expert evidence may be of assistance to the court, the court must be satisfied as to the expertise of such persons in his relevant field. Refer to the Court of Appeal in *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 MLJ 85:

> It is the duty of the court to satisfy itself that the expert is indeed an expert specially qualified, armed with necessary skill and experience and has a vast knowledge in the field of enquiry carried out by him. The court would also want to know the duration

A of time the expert has engaged himself in his field of expertise and whether that his only occupation and in which court he has testified. Generally, the court is interested to know the expert's background. The purpose is simply to show the competency of the expert.

B **[33]** DW1 had referred to s 458 of the CCC to say that ownership of movable property is transferred to the buyer the moment when the contract of sale is entered into. However, he omitted to refer to s 459 of the CCC which states:

C If a contract of sale is subject to a condition or to a time clause, the ownership of the property is not transferred until the condition is fulfilled, or the time has arrived.

[34] He has also omitted to refer to s 460 which provides ownership of the D property is not transferred to the buyer until the acts required to be done by the buyer under the contract has been done.

[35] In cross-examination, DW1 conceded that s 458 of the CCC has to be read with ss 459–460 and that he did not know if there were indeed conditions E to be met under the borrower's sale agreement for the purchase of machinery.

[36] PW5, however, clarified that the CCC is general law which provides that ownership of movable property which is non-registered machinery would transfer to the purchaser upon completion of a sale and purchase agreement F and this was subject to the conditions of the sale contract being met. However, the specific law to look at in relation to registered machinery is the Machinery Registration Act.

G **[37]** Both Thai experts agreed and confirmed that in order to obtain a mortgage over machinery and equipment, the ownership of the machinery and equipment has to be registered first, pursuant to the Machinery Registration Act of Thailand. This can be seen in:

(a) PW5's answer to Q17 at pp 9–10 of his witness statement;

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(b) DW1's answers to Q19–Q20; and

(c) ss 4 –6 of the Machinery Registration Act:

Section 4: Any machinery to be registered for ownership under this Act shall I be accordance with the Ministerial Regulation.

Section 5: Any machinery registered for ownership under this Act shall be regarded as a movable property which can be mortgaged under Section 703(4) of the CCC, and the provisions of Section 1299, 1300 and 1301 of the CCC shall be applied mutatis muntandis.

> Section 6: Any ownership of machinery who intends to register his/her machinery shall file an application with the registrar under this Act in accordance with the criteria, procedures, and forms prescribed in the Ministerial Regulation.

[38] Both Thai experts had also confirmed that to apply for registration of the ownership of the machinery and equipment, the following steps must be taken:

(a) the applicant must fill up the relevant forms and submit the same to the Machinery Registrar of Thailand, who may inspect the machinery at the borrower's factory;

(b) the machinery registrar will put up the application for ownership of the machinery for publication, which is open to the public, to ascertain if there is any third party who challenges the same;

(c) if a third party challenges the application for ownership, the machinery registrar will conduct an investigation to determine who the actual owner of the machinery is;

(d) only after the machinery registrar is satisfied the applicant for the ownership of machinery is the actual owner, the registrar will issue a certificate of ownership of the machinery in question; and

(e) then only can a mortgage or charge over such machinery be registered.

[39] Based on those testimonies, I therefore agree with the plaintiff that for the purpose of mortgaging the machinery and equipment, the applicant obtains conclusive ownership of machinery and equipment only after a certificate of ownership over the machinery is issued by the relevant Ministry in Thailand. Thereafter, a charge/mortgage can be registered over the machinery and equipment.

[40] It is a fact that the political turmoil erupted in Thailand in August 2008, and the borrower's sole offtaker, Transtech, had terminated the offtake agreement as a result of such turmoil.

[41] PW3 had testified that the borrower was not cooperating and not willing to start up its equipment for inspection by the Thai Ministry officials. PW3 said that the borrower's director, Gordon Thomas, was concerned as:

(a) to create a charge over the machinery/equipment, the same must first be commissioned or operated, as witnessed by a Thai Ministry of Industry officer, before the said Ministry will register the ownership of the machinery and equipment and a mortgage over the same;

(b) however, the commissioning of the plant would entail the introduction of bitumen into the borrower's machinery, which if poured into the machinery, would be virtually impossible to clean off; and

(c) Gordon Thomas was very concerned that the testing of the borrower's machinery would devalue the equipment and make it very difficult to sell.

[42] This was within the defendant's knowledge, as Gordon Thomas himself had notified both plaintiff and defendant of this, as shown in the defendant's own minutes of the meeting held at the defendant's office on 25 May 2009 as follows:

> In addition, Mr. Thomas also explained that if the plant is commissioned, depreciation will start, and subsequently reduce the value of the plant.

[43] In cross-examination, the defendant had tried to put it to the plaintiff's Thai legal expert, PW5, that pursuant to cl 2 of the Thai Ministerial Regulation No 8, an owner of machinery could be registered as owner even though the said machinery, used in the industrial activities under List 2, had not been installed or commissioned.

[44] In reply to the defendant's question, PW5 had explained that installation and commissioning of the machinery was still necessary, for the reason that the machinery registrar requires an applicant to complete the relevant application forms, and such forms require details ie showing the photographs and layout plans of the machinery and the instructions or operating menu in question. If the form was incomplete, the machinery registrar will not accept the applicant's application.

[45] PW5, had said, in his experience of having done more than 50 transactions of this nature, the machinery registrar will 100% require to conduct an inspection of the machinery at the site or at the factory. The machinery registrar then has a discretion to order the testing of the machinery, especially if the machinery is one which the officer is unfamiliar with.

[46] PW5 had also explained that cl 2 of the Ministerial Regulations No 8 is an exception to the general rule requiring inspection and testing of the machinery, and that cl 2 only applies if the machineries listed under List 1 of the Ministerial Regulation are used in the industrial activities as set out in List 2 of the said Ministerial Regulations.

[47] Both the expert witnesses in their evidence in court had confirmed that as lawyers, they would not be able to tell whether any machinery would fall

within Lists 1 and 2 of Ministerial Regulations No 8. DW1's answer to cross-examination is as reproduced below:

> Q: As a lawyer, Mr. Suriya, if there is a whole listing of what this factory had, as a lawyer would you be able to conclusively say that item A is in list 1, item B in list 2?
>
> A: I can give certain advice but cannot …
>
> Q: Conclusively say. Who can?
>
> A: The authority.
>
> Q: What would the authorities do in terms of deciding?
>
> A: They come to inspect

[48] Hence, I again agree with the plaintiff that at the end of the day, the inescapable conclusion is that it is the machinery registrar who has the ultimate discretion to register the machinery and before he does so, he may require the machinery to be operated/tested. It is also a fact that if the ownership of the borrower's machinery is not registered under the Machinery Act, the borrower has no legal ownership over the same which would entitle the borrower to create a charge/mortgage and register the same over the borrower's machinery and equipment.

[49] On top of that, DW3 had testified that the machinery and equipment is fabricated by Eastern Petroleum, whose plant is located in Malacca, Malaysia, and that manufactured machinery and equipment were sent to the borrower's plant in Thailand. As such, the defendant's contention that the charge ought to be registered in Thailand when the machinery is still in its fabrication stages in Malaysia, is obviously misconceived.

[50] Based on the above, I cannot agree with the defendant that the plaintiff must be faulted on the non registration of the charge.

[51] In addition to non-creation of the mortgage, the defendant contends that the plaintiff had also breached other express terms of the guarantee namely, cll 6.1.7 and 6.1.10:

> 6.17: not to do anything to prejudice or adversely affect the rights and interests of or remedies available to EXIM BANK under this Guarantee Agreement.
>
> …
>
> 6.1.10: take all such measures as permitted by law to preserve the securities created under the Facility Agreement …

[52] It is the defendant's case that the plaintiff has failed to take all reasonable steps to preserve the machinery/equipment (which were intended to secure the facility) and that such failure had resulted in the machinery/equipment being dissipated and/or removed from the Thai factory.

[53] The defendant contends that the plaintiff never had any control nor made any attempt to exercise any control over the machinery/equipment from day one.

[54] At the outset, I agree with the plaintiff that the defendant is estopped from complaining about the move of the borrower's machinery, as the evidence produced during the trial shows that the defendant had consented to this. This can be seen from the following:

(a) the defendant's minutes of a meeting held on 25 May 2009 at pp 314–316, at p 315, bundle 'B';

(b) the defendant's minutes of a meeting held on 25 June 2009 at 8pm at pp 319–320, at p 319 of bundle 'B';

(c) the borrower's letter of 17 May 2010 to the defendant at p 25 of bundle 'C1', where the borrower said that it was:

> imperative to safe guard the asset by removing it from Thailand forth with without any further delays … If we do not hear from you in the next 5 days we take it that you agree with our action …

(d) PW1's answer to cross-examination, reproduced below:

> Q19: My question is the plaintiff knew of the borrower's intention to move out the equipment and the machineries from the plant?
>
> A: Both EXIM and the plaintiff knew that during the site visit.

(e) DW2's answer to cross-examination Q116–122 at pp 98–99 of the notes of proceedings;

(f) DW3's answer to cross-examination Q57–Q60 at p 113 of the notes of proceedings as reproduced below:

> Q57: Do you agree this meeting with Gordon Thomas, there were discussions on the possibility of moving the equipment to Port Tanjung Pelepas?
>
> A: Yes.
>
> Q58: Do you agree that this arouse because Gordon Thomas says that he may have a new customer called Chevron who may take up his supplies in Port Tanjung Pelepas?
>
> A: Actually we were trying to salvage the project so that is why we

suggested probably to bring the equipment back to Port Tanjung Pelepas and then requested Gordon to look for an offtaker.

Q59: When you say we …

A: EXIM Bank

Q60: So in fact EXIMBank was t he one who suggested say bring it back, find a buyer and we will see how we can salvage it?

A: Yes.

(g) DW3's answer to cross-examination Q91–Q92 at p 117 of the notes of proceedings as reproduced below:

Q91: If Bitumen Bales could not find a customer in Thailand, in your opinion, would it be sensible for him to then try and find a customer in Malaysia?

A: That would be an option for him.

Q92: And in fact it was because of that option, you agree that EXIM Bank in fact agreed to allow him to move it back to Malaysia the equipment?

A: Yes.

[55] It cannot therefore be disputed that the defendant had full knowledge of the borrower's intention to move its assets and made no objections to the same. The evidence shows that it was the defendant who suggested that the borrower shifts its machinery to Johor.

[56] DW3 had also testified that the defendant's senior management and credit department knew of the defendant's suggestion to move the borrower's equipment back to Malaysia.

[57] However, the defendant did not produce the officers who could have given evidence on this as witnesses for this trial. Such failure on the part of the defendant to produce these officers as witnesses would surely draw an adverse inference under s 114(g) of the Evidence Act 1950, that their evidence is unfavorable to the defendant.

[58] The onus is on the defendant to prove both limbs under s 92 of the Contracts Act 1950 before it is discharged from its liability to pay to the plaintiff the guaranteed amount. Refer to *Eon Bank Bhd (previously know as Oriental Bank Bhd) v Mohd Yunus bin Alias & Ors* [2010] 9 MLJ 587, wherein the Court of Appeal held:

Section 92 contains two limbs. Not only must the defendant prove either the refusal to appoint the receivers and managers is inconsistent with their rights to insist on such appointment, or that the plaintiff was under a duty to make such an appointment, the defendants must also prove that such refusal or failure to appoint impaired the defendants' eventual remedy against the principal debtor.

[59] The defendant's eventual remedy here is the security over the borrower's machinery and equipment, which will be subrogated to the defendant upon payment or performance of all of that the defendant is liable for.

[60] I agree with the plaintiff that the remedy is intact, as there is still the debenture and the power of attorney to sell the borrower's machinery and equipment which are now located in Johor. The power of attorney has already been registered in the Kuala Lumpur High Court. The Thai charge is no longer viable as the machinery is in Johor, Malaysia, with the defendant's consent.

[61] The defendant's remedy against the machinery and equipment still remains intact, as the plaintiff has not sold the same. Hence, again I agree with the plaintiff that there is nothing for the defendant to complain about.

[62] In respect of the other security for the term loan ie the assignments of the SBLC, DSRA and the collection/project account, which has been obtained by the plaintiff, the defendant has no right to complain about the non-procurement of the SBLC and the lack of funds in the collection/project account and the DSRA because this security was agreed to by the defendant and was set out in the guarantee agreement.

[63] PW3 had confirmed that the list of equipment financed by the plaintiff is in fact as for the sale and purchase agreement entered between the borrower with the fabricator. The list of the borrower's equipment and machinery is therefore obviously available, and the simple solution to the defendant's complaint is to cross check the borrower's machinery and equipment located at the Port Tanjung Pelepas warehouse with this list.

[64] The defendant has made the allegation that parts of the borrower's machinery were missing. Throughout the trial, although the onus was on the defendant to prove its assertions that parts of the borrower's machinery were missing, the defendant has shown no evidence that any machinery was missing. Even the defendant's witness, DW3, could not confirm that any of the borrower's machinery was missing when he conducted a site visit to the borrower's factory in 2010.

[65] Furthermore, both DW2 and DW3 had confirmed that neither of them had conducted any site visit to view the borrower's machinery and equipment

in Port Tanjung Pelepas. As such, I agree with the plaintiff that the defendant's allegations of missing machinery and equipment are baseless and unfounded.

[66] The defendant's liability under the guarantee agreement is spelt out in the terms of the guarantee agreement.

[67] The terms of the guarantee agreement provide that:

(a) upon an event of default by the borrower, the defendant unconditionally and irrevocably guaranteed to the plaintiff that the defendant shall pay to the plaintiff the outstanding amounts due from the borrower existing on the date of the plaintiff's notice of claim to the defendant up to the date of payment (cl 3.1);

(b) the plaintiff is entitled to demand payment of the outstanding amounts due from the borrower to the plaintiff from the defendant in the manner set out in the guarantee agreement (cl 3.2.);

(c) all payments required to be made by the defendant shall be calculated without reference to any set-off or counterclaim and shall be made free and clear of and without any deduction for or on account of any set-off or counterclaim and shall be paid by the defendant to the plaintiff (cl 3.3). This relates to s 94 of the Contracts Act 1950 and is put in to prevent the defendant from insisting on paying the guarantee amount less the value of any security alleged to be lost;

(d) where the defendant has discharged the whole or outstanding debt or liability of the borrower to the plaintiff subject to guaranteed amounts, the defendant shall have the rights to be subrogated to all rights possessed by the plaintiff in respect of the debt or liability, to which the guarantee relates (cl 5.1);

(e) the plaintiff irrevocably undertakes to secure the term loan by, among others, the debenture, the charge, and all other securities as set out in cl 6.1.3; and

(f) the plaintiff shall take all such measures as permitted by law to preserve the securities created under the facility agreement, and where an event of default has occurred, the plaintiff shall take such reasonable and necessary steps at the defendant's directions and expense to effect recoveries in respect thereof (cl 6.1.10).

[68] As shown above, cl 6.1.10 provides that the plaintiff shall take such reasonable steps at the defendant's directions to effect recoveries of the security when an event of default has occurred. However, the defendant had refused to give any directions whatsoever to the plaintiff, despite the plaintiff's request for the same vide its letter of 8 June 2011. The defendant did not even want to

conduct a site visit in Johor. This in itself would disentitle the defendant from complaining about the plaintiff's actions vis a vis the security.

[69] Nothing in cl 6 of the guarantee agreement states that the defendant is discharged from its liability to pay the plaintiff if the plaintiff's obligations in cl 6.1.3 are not met. As the guarantee agreement was prepared by the defendant's solicitors, the defendant could have made this a term of the guarantee agreement. Yet, it choose not do so. Instead, the proviso in cl 6.1.10 states that the defendant shall not be liable to reimburse the plaintiff where to defendant has given directions as a result of negligence or omission on the part of the plaintiff. This proviso thus contemplated the possible negligence of the plaintiff with regard the security but only exempts the defendant from paying expenses incurred out of such negligence. However, the proviso does not discharge the defendant from its liability under the guarantee agreement.

[70] Further, cl 7(d) of the guarantee agreement provides that the defendant represents and warrants to the plaintiff that subject as expressly provided for in the guarantee agreement, the obligation of the defendant contained therein are direct, unconditional and general obligations of the defendant.

[71] Finally, cl 10.1 of the guarantee agreement provides as follows:

> MAYBANK hereby agrees to indemnify and to keep EXIM BANK indemnified and to hold EXIM BANK harmless from and against any damages, deficiencies, losses, costs, liabilities and expenses sustained or incurred by EXIM BANK, resulting directly or indirectly from MAYBANK's failure in perfecting (solely to the extent of those actions which MAYBANK is entitled to take under the terms of the Facility Agreement and/or related Security Documents) any security (or any part thereof), or any of the security (or any part thereof) becoming unenforceable or invalid as a result of any action or inaction by MAYBANK (in case of any inaction), solely to the extent that MAYBANK failed to take any action which it is entitled to take under the terms of the Facility Agreement and/or the related Security Documents), in protecting the interests of EXIM BANK in respect of any rights (including enforcement rights) under the security (or any part thereof).

[72] Clause 10.2 of the guarantee provides that for the purposes of cl 10.1 above, the plaintiff shall not be liable to indemnify the defendant if the plaintiff had exercised its rights under the facility agreement and/or related security documents by acting in accordance with the provisions of the guarantee agreement.

[73] Clause 10.1 evidently shows that the defendant is not discharged of its liability to pay in the event the security for the term loan is not perfected or becomes unenforceable or where the plaintiff failed to take any action in

protecting the interests of the defendant with respect to the security. The defendant has a right to the plaintiff's indemnity instead.

[74] According to DW3, cl 10.1 was in fact proposed by the defendant's lawyers to be inserted in the guarantee agreement clearly the defendant had intended that the defendant's obligation to pay the guaranteed amount was independent of the security to be obtained for the term loan. To me, as submitted by the plaintiff, the aforesaid provisions, read in their entirety, clearly shows that even if the machinery was lost, the defendant would not be discharged of its liability to pay the guarantee amount. Even s 94 of the Contracts Act does not provide so, for it provides that the surety is only discharged to the extent of the value of the security. Also, s 92 is not applicable to the defendant's case, by virtue of the indemnity cl 10.1 of the guarantee agreement. It is well settled that parties can contract out of s 92 of the Contracts Act. Refer to *Cempaka Finance v PKB-Teknik Sdn Bhd & Ors* [2010] MLJU 1326; [2011] 10 CLJ 71 where the court referred to the Privy Council case of *Ooi Boon Leong & Ors v Citibank NA* [1984] 1 MLJ 222 and held that the proposition that parties are able 'contract out' of ss 92 and 94 is too well established to be questioned.

THE CONCLUSION

[75] Based on the evidence before me and after considering submissions made by learned counsel for each party respectively, I agree totally with the plaintiff that the defendant has no grounds to deny liability under the guarantee agreement, as there has been no deprivation of the defendant's remedies. In respect of the defendant's concerns regarding the borrower's machinery, the obvious solution is for both parties to conduct a site visit at the warehouse in Port Tanjung Pelepas, after the defendant has paid the guaranteed amount to the plaintiff. Thereafter, if the defendant finds any deficiency or suffers losses from the enforcement of its rights under the debenture and the power of attorney, the defendant has its rights under the guaranteed agreement. At the end of the day, it cannot be denied that parties had intended for the defendant to unconditionally and irrevocably guarantee the term loan.

[76] I therefore allow the plaintiff's claim in prayer 16(a)–(b) of the statement of claim with costs.

Plaintiff's claim allowed with costs.

Reported by Kohila Nesan